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The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation

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THE CAPITAL DEFENDANT'S RIGHT TO MAKE A PERSONAL PLEA FOR MERCY: COMMON LAW ALLOCUTION AND CONSTITUTIONAL MITIGATION

By J. THOMAS SULLIVAN*

Criminal defense lawyers recognize that their ability to personalize the capital defendant in a death penalty trial is of critical importance in avoiding the death penalty. The defendant's appearance and testimony before the sentencing jury or judge often plays the most significant role in securing a favorable sentencing verdict.[1] Defense counsel endeavor to present the accused as an individual capable of feeling and expressing remorse and of demonstrating some measure of hope for the future in making their plea for a sentence alternative to death. These strategies may offset the strong evidence which is characteristic of many death penalty prosecutions. In many instances, however, counsel advises the accused not to testify. Counsel attempts to avoid disclosure of the defendant's prior criminal record because the record may have an adverse impact on jurors deciding whether to impose the death penalty.[2]

This Article proposes that a capital murder defendant, once convicted and facing the possibility of his jury imposing a death sentence, must have an unencumbered right to make a personal plea for leniency. The "right" to make a plea for mercy arises from the concept of allocution—the right of the accused to speak in his own behalf prior to pronouncement

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The approach advocated in this article was successfully used in State v. Simonson, 100 N.M. 297, 669 P.2d 1092 (1983), by trial attorneys with the New Mexico Public Defender Department's Albuquerque trial office: former District Defender Bruce Kelly, Albert "Pat" Murdoch, and Norm St. Landau. The trial judge, the Honorable A. Joseph Alarid, now a judge of the New Mexico Court of Appeals, granted defense counsel's motion to afford the accused an opportunity to make his personal statement to the jury. Defendant Simonson was sentenced to life imprisonment and no issue regarding his allocutory statement was litigated on appeal. The author wishes to thank Rosemary Mendonca, Administrative Secretary, and Annabelle Sandoval, Secretary, Appellate Division, New Mexico Public Defender Department for their assistance in preparing this manuscript.

1. Balske, *New Strategies for the Defense of Capital Cases*, 13 Akron L. Rev. 331, 356-57 (1979). *See* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983).

2. *See* Weaver v. United States, 408 F.2d 1269 (D.C. Cir.), cert. denied, 395 U.S. 927 (1969); J. Weinstein, Evidence, § 609[3] (1982) and cases and materials therein cited; Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Criminal Record*, 4 Colum. J.L. & Soc. Probs. 215 (1968).

of sentence by the trial judge[3]—and the constitutional requirement that a capital sentencing procedure permit the accused to offer mitigating evidence.[4] The right to speak without threat of disclosing otherwise undisclosed information such as a prior record may prove valuable, or decisive, to a capital defendant seeking to avoid the death penalty.

Currently, evidentiary rules permit the prosecution to impeach a defendant making a personal plea with his prior record of conviction or of criminal activity generally.[5] These rules restrict the accused's direct communication with the jury or judge.[6] In contrast to the situation in which the defendant testifies, as that term is traditionally understood, the defendant's personal plea for leniency or mercy in a capital case does not justify impeachment with his prior criminal record. The constitutional guarantees of the right of due process,[7] the right of the accused to present a defense,[8] and the prohibition against cruel and unusual punishment,[9]

3. *See generally* Barrett, *Allocution*, 9 Mo. L. Rev. 115, 232 (1944) (discussing history of allocution and alternative approaches among American jurisdictions; criticizing the right under Missouri law as a technical formality, the absence of which does not prejudice the accused).

The American Bar Association's Standards for Criminal Justice § 18-6.4 recommends that sentencing proceedings should "afford to the defendant his or her right of allocution. . . ." In State v. Nicoletti, ___ R.I. ___, 471 A.2d 613 (1984), the court reversed defendant's judgment and sentence where the trial court failed to afford defendant an opportunity to address the court prior to sentencing, based on article I, section 10, of the Rhode Island Constitution. *See also* Koteles v. State, 660 P.2d 1199, 1200 (Alaska Ct. App. 1983); State v. Fettis, 136 Ariz. 58, ___, 664 P.2d 208, 209 (1983) (*en banc*); State v. Goodrich, 97 Idaho 472, 546 P.2d 1180 (1976); In re Stevens, 144 Vt. 250, 478 A.2d 212 (1984) (all recognizing right of allocution).

The value of the right is illustrated by State v. Brinkley, 681 P.2d 351 (Alaska Ct. App. 1984). The defendant had been sentenced for a sexual offense without benefit of allocution and the case was remanded for a new sentencing proceeding. Thereupon, the accused's challenge of the judge was sustained based on his prior sentencing decision and another judge was appointed to conduct the sentencing hearing. The second proceeding and change of judge resulted in defendant receiving a lesser sentence than previously imposed. *Id.* at 352, 354.

4. Lockett v. Ohio, 438 U.S. 586 (1978). "We . . . conclude that the eighth and fourteenth amendments require that the sentencer . . . not be precluded from considering *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defense proffers as a basis for a sentence less than death." *Id:* at 604 (emphasis in original). *See* Woodson v. North Carolina, 428 U.S. 280 (1976).

In People v. Smith, 63 N.Y.2d 41, 479 N.Y.S.2d 706, 468 N.E.2d 879 (1984), the New York Court of Appeals held that a mandatory death penalty statute applicable to murders committed by inmates serving indeterminate term sentences of 15 years to life violated the Supreme Court's interpretation of the eighth amendment that the sentencing authority be permitted to consider all relevant mitigating circumstances in setting punishment. *See infra* notes 29-30 and accompanying text.

5. N.M.R. Evid. 404(b), 609.

6. The Washington Supreme Court, in State v. Jones, 101 Wash. 2d 113, 677 P.2d 131 (1984) (en banc), observed: "[T]he admission of a defendant's witness' prior convictions may well adversely affect that defendant's decision to take the stand. . . . The defendant's fears are well-founded." *Id.* at ___, 677 P.2d at 136 (citation omitted).

7. U.S. Const. amend. V provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

8. U.S. Const. amend. VI provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

also militate against the prosecution's use of prior convictions or criminal activity to impeach a testifying defendant whose statement consists merely of a plea for leniency.[10]

In order to assess the claimed validity of this right, this Article examines three different aspects of sentencing procedure: the New Mexico approach to capital sentencing, compared with other major approaches; the constitutional requirement that a capital sentencing proceeding permit the accused to offer evidence in mitigation of punishment; and the common law right of allocution. It then examines the proposed plea for mercy and the chilling effect of impeachment of a defendant pleading for mercy.

I. AN OVERVIEW OF CAPITAL SENTENCING PROCEDURES

In response to decisions of the United States Supreme Court limiting the use of capital punishment as a sentencing option in murder cases,[11] states have adopted varied approaches to capital sentencing.[12] These var-

> trial, by an impartial jury . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

9. U.S. Const. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

10. The author premises this position on the notion of a "super due process" demanded by the courts in death penalty cases. *See* Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. Cal. L. Rev. 1143 (1980); *see also* Lockett v. Ohio, 438 U.S. 586 (1978), *and* Bell v. Ohio, 438 U.S. 637 (1978) (reversing death penalty statutes which failed to provide defendants adequately with constitutionally required opportunity to demonstrate mitigating circumstances justifying imposition of life sentences, rather than death).

11. The Supreme Court struck down existing death penalty laws in Furman v. Georgia, 408 U.S. 238 (1972). Subsequent efforts to enact mandatory death sentences for murder were declared unconstitutional in Roberts v. Louisiana, 428 U.S. 325 (1976), and Woodson v. North Carolina, 428 U.S. 280 (1976). Other attempts to enact constitutionally acceptable death penalty statutes were deemed successful in a trio of cases which proved to be a cornerstone in the resuscitation of capital punishment. *See* Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), *and* Jurek v. Texas, 428 U.S. 262 (1976). Ohio's statute was subsequently ruled too limited in terms of the accused's right to present mitigating evidence. Lockett v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S. 637 (1978). The court also struck down Georgia's inclusion of rape as a capital offense in Coker v. Georgia, 433 U.S. 584 (1977).

12. The recent history of the New Mexico death penalty statute is illustrative. Prior to the landmark decision in Furman v. Georgia, 408 U.S. 238 (1972), N.M. Stat. Ann. § 40A-29-2 (1953) provided that the jury's recommendation that the accused be sentenced to life imprisonment would prohibit a trial judge from imposing the death sentence upon conviction for a capital felony. Similarly, the accused would avoid death by entering a plea of guilty to the capital offense charged. Following *Furman*, the legislature repealed this provision, adopting a mandatory death penalty scheme for all adults convicted of capital offenses. N.M. Stat. Ann. § 40A-29-2 (1953). Under both schemes, capital felonies subject to punishment by death were limited by § 40A-29-2.1 to murder of a police officer or jail guard while in the performance of his duties or to commission of a second capital felony after time for due deliberation following commission of an initial capital offense. The New Mexico Supreme Court upheld the mandatory sentencing approach in Serna v. Hodges, 89 N.M. 351, 552 P.2d 787 (1976).

Within weeks after Serna v. Hodges, the court reversed itself in light of the intervening United States Supreme Court decision in Woodson v. North Carolina., 428 U.S. 280 (1976). State v.

iations affect the assessment of the legal merits of the personal plea for mercy. For the most part, the major approaches all require the sentencing authority to consider the facts surrounding the offense as a primary basis for determining punishment and then require a consideration of the accused as a second factor.[13]

Rondeau, 89 N.M. 408, 553 P.2d 688 (1976). The *Rondeau* court voided the mandatory punishment provision in light of the *Woodson* holding. *Id.* at 411-12, 553 P.2d at 691-92. The *Rondeau* court held that capital punishment is not cruel and unusual, but concluded that the mandatory scheme adopted by the legislature violated federal constitutional precepts. *Id.* at 412-13, 553 P.2d at 692-93. *See also* State v. Rumsey, 267 S.C. 236, 226 S.E.2d 894 (1976) (voiding South Carolina's mandatory death penalty statute and relied on by the court in *Rondeau*).

Following the approval of capital punishment statutes not relying on mandatory death penalty provisions, the legislature enacted the current statute, N.M. Stat. Ann. §§ 31-20A-1 to -6 (Repl. Pamp. 1981), which survived constitutional attack in the New Mexico Supreme Court in State v. Garcia, 99 N.M. 771, 664 P.2d 969, *cert. denied*, 103 S. Ct. 2464 (1983).

Other states also have enacted capital punishment statutes in the wake of the 1976 rejection of arguments that the death penalty *per se* violates the eighth amendment:

Alabama: Ala. Code § 13A-5-49 (1982)
Arizona: Ariz. Rev. Stat. Ann. § 13-703 (Supp. 1982)
Arkansas: Ark. Stat. Ann. § 41-1303 (1977)
California: Cal. Penal Code § 190.1 (West 1983)
Colorado: Colo. Rev. Stat. § 16-11-103 (Cum. Supp. 1984)
Connecticut: Conn. Gen. Stat. Ann. § 53a-46a (West 1981)
Delaware: Del. Code Ann. tit. 11, § 4209 (Supp. 1982)
Florida: Fla. Stat. Ann. § 921.141 (West 1981)
Georgia: Ga. Code Ann. § 17-10-30 (1982)
Idaho: Idaho Code § 19-2515 (1979)
Illinois: Ill. Ann. Stat. ch. 38, § 9-1 (Smith-Hurd 1979)
Indiana: Ind. Code Ann. § 35-50-2-9 (Burns 1979)
Kentucky: Ky. Rev. Stat. § 532.025 (Supp. 1982)
Louisiana: La. Code Crim. Proc. Ann. art. 905 (West. 1983)
Maryland: Md. Code Ann. art. 27, § 413 (Repl. Pamp. 1982)
Massachusetts: Mass. Ann. Laws ch. 279, § 69 (Michie/Law Co-op. 1983)
Mississippi: Miss. Code Ann. § 99-19-1 (Supp. 1982)
Missouri: Mo. Rev. Stat. § 565.012 (Supp. 1982)
Montana: Mont. Code Ann. § 46-18-301 (1982)
Nebraska: Neb. Rev. Stat. § 29-2523 (1979)
Nevada: Nev. Rev. Stat. § 200.033 (1981)
New Hampshire: N.H. Rev. Stat. Ann. § 630:5 (Supp. 1981)
New Jersey: N.J. Stat. Ann. § 2C:11-3 (West 1978)
New York: N.Y. Penal Law § 125-27 (McKinney 1975)
North Carolina: N.C. Gen. Stat. § 15A-2000 (Supp. 1981)
Ohio: Ohio Rev. Code Ann. § 2929.02 (Page 1982)
Oklahoma: Okla. Stat. Ann. tit. 21, § 701 (West Supp. 1982)
Pennsylvania: 42 Pa. Cons. Stat. Ann. § 9711 (1982)
South Carolina: S.C. Code Ann. § 16-3-20 (Law. Co-op. 1982)
South Dakota: S.D. Comp. Laws Ann. § 23A-27A-1 (Supp. 1981)
Tennessee: Tenn. Code Ann. § 39-2-203 (1982)
Texas: Tex. Code Crim. Proc. Ann. § 37.071 (Vernon 1965)
Utah: Utah Code Ann. § 76-3-201 (1981)
Vermont: Vt. Stat. Ann. § 2303 (Supp. 1982)
Virginia: Va. Code § 19.2-264 (Supp. 1982)
Washington: Wash. Rev. Code Ann. § 10.95.070 (Supp. 1983)
Wyoming: Wyo. Stat. § 64-101 (Supp. 1982)

13. The constitutional requirement imposed by Woodson v. North Carolina, 428 U.S. 280 (1976), is that the sentencing decision focus on the "circumstances of the offense together with the character and propensities of the offender." *Id.* at 304. The approach is designed to insure that capital defendants are viewed as "uniquely individual human beings." *Id.*

A. *The Circumstances of the Offense*

The Supreme Court developed the primary basis—the circumstances of the offense—in decisions requiring the states to limit application of the death penalty to offenses for which the penalty is constitutionally appropriate.[14] Thus, in *Godfrey v. Georgia*,[15] the Court suggested that the overly broad categorization of all murders as demonstrating a calloused disregard for human life (and, therefore, as warranting the death penalty) could run afoul of constitutional limitations.[16] Similarly, in *Coker v. Georgia*,[17] the Court rejected application of capital punishment as appropriate for the offense of rape. The Court essentially held capital punishment inappropriate for any state offense except murder.[18]

All capital murder statutes use definitional characteristics to distinguish murders punishable by death.[19] For instance, the Texas statute defines certain circumstances as elements of capital murder;[20] the statute categorizes capital murder as an offense distinct from first degree murder. Other states incorporate capital murder in their uniform definitions of first degree murder, but provide that the death penalty may be applied if the offense is committed under statutorily enumerated "aggravating circumstances."[21] Typically, the alternative theories of capital murder under the

14. Currently, no state statute imposes death for any offense except murder. The federal death penalty for espionage authorized by 18 U.S.C. § 794(a)(1982) recently was declared unconstitutional by the Ninth Circuit Court of Appeals. United States v. Harper, 729 F.2d 1216 (9th Cir. 1984).

15. 446 U.S. 420 (1980).

16. In *Godfrey*, the Court reviewed a death sentence imposed under the aggravating circumstance requiring that the murder was "outrageously or wantonly vile, horrible or inhuman." *Id.* at 442. The Court held that, under the facts of the case, this standard did not properly distinguish capital from non-capital murders, as constitutionally required.

17. 433 U.S. 584 (1977).

18. *Id.* at 592. *See* Radin, *supra* note 10, at 1145 n.6. Rape has, however, traditionally played an important factor in death penalty legislation and in the number of executions. In Smith v. Commonwealth, 319 Va. 455, 248 S.E.2d 135 (1978), the Virginia Supreme Court reviewed defendant's sentence of death for capital murder committed in the course of committing rape and noted that "of the 236 persons actually executed in the last seven decades, 232 had been convicted of murder or rape or murder in connection with rape." *Id.* at ___, 248 S.E.2d at 151.

19. For example, N.M. Stat. Ann. § 30-2-1 (1978) defines all first degree murders as "capital felonies" in New Mexico. The death sentence may only be imposed if the first degree murder is committed under one of the categories of "aggravating circumstances" set forth in N.M. Stat. Ann. § 31-20A-5 (Repl. Pamp. 1981). These generally include: 1) murder of a police officer; 2) murder during commission or attempted commission of kidnapping, criminal sexual penetration, or criminal sexual contact with a minor; 3) murder during escape from a New Mexico penal institution; 4) murder by an inmate of an inmate; 5) murder of an employee of the corrections department by an inmate; 6) murder for hire; and 7) murder of a witness to prevent report of a crime or in retaliation for testimony previously given.

20. Tex. Penal Code Ann. § 19.03 (Vernon 1974). These categories include: 1) murder of a law enforcement officer or fireman; 2) murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson; 3) murder for hire or promise of remuneration; and 4) murder committed during escape or attempted escape from a penal institution. The Texas statute defines the capital form of the offense by reference to these five categories and to murder as defined by Tex. Penal Code Ann. § 19.02(a)(1): "A person commits an offense if he . . . intentionally or knowingly causes the death of an individual. . . ."

21. *See, e.g.*, N.M. Stat. Ann. §§ 30-2-1, 31-20A-5 (1978 and Repl. Pamp. 1981). The "aggravating circumstances" approach was approved by the Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976), and Gregg v. Georgia, 428 U.S. 153 (1976).

Texas statute[22] and the enumerated aggravating circumstances of other statutes[23] address the same offenses: murders committed for hire;[24] murders involving law enforcement[25] or prison personnel;[26] or murders committed to facilitate or in the course of committing other felony offenses.[27]

The statutory definition given those offenses which state legislatures deem appropriate for punishment by death forms the primary limit upon the imposition of capital punishment.[28] The Supreme Court, however, precluded states from imposing death uniformly on all persons convicted of such offenses, holding that mandatory death penalty schemes violate the eighth amendment protection against the arbitrary imposition of capital punishment.[29] Instead, the Court, in striking down mandatory death penalty statutes, effectively required the states to develop approaches that provide for individualized determinations on the appropriateness of the death penalty.[30]

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22. *Supra* note 20.

23. *E.g.*, N.M. Stat. Ann. § 31-20A-5 (Repl. Pamp. 1981).

24. *Id.* § 31-20A-5(F).

25. *Id.* § 31-20A-5(A).

26. *Id.* § 31-20A-5(E) (murder of prison employee). *See* State v. Garcia, 99 N.M. 771, 664 P.2d 969, *cert. denied,* 103 S. Ct. 2464 (1983), *and* N.M. Stat. Ann. § 31-20A-5(D) (Repl. Pamp. 1981) (murder of inmate by inmate). *See also* State v. Creech, 105 Idaho 362, 369, 670 P.2d 463, 470 (1983) (upholding sentence of death for defendant convicted of murdering another inmate of the Idaho State Penitentiary).

27. N.M. Stat. Ann. § 31-20A-5(B) (Repl. Pamp. 1981) defines murders committed during commission of kidnapping, criminal sexual penetration, and criminal sexual contact of a minor as aggravating circumstances. *See* State v. Finnell, ___ N.M. ___, 688 P.2d 769 (1984); State v. Guzman, 100 N.M. 756, 676 P.2d 1321 (1983), *cert. denied,* 104 S. Ct. 3548 (1984); State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983), *cert. denied,* 104 S. Ct. 1930 (1984). Section 31-20A-5(C) defines murder committed during attempted escape from a penal institution, also a felony under New Mexico law, as an aggravating circumstance. These aggravating circumstances may reflect traditional felony-murder notions or may suggest a greater degree of culpability.

Under the New Mexico murder statute, N.M. Stat. Ann. § 30-1-2 (1978), a felony murder conviction would appear to support a sentence of death if committed under a statutorily enumerated aggravating circumstance. *But c.f.* Lockett v. Ohio, 438 U.S. 586, 624-25 (1978) (White, J., concurring) (questioning the constitutionality of imposing death for a killer who did not intend to kill). *See also* Radin, *supra* note 10, at 1161 n.64 (discussing appropriateness of death sentence in such instances).

28. For example, although some state legislatures have included armed robbery as a felony constituting the basis for finding murder committed during commission of a felony, the New Mexico legislature has not done so. But consider State v. Finnell, ___ N.M. ___, 688 P.2d 769 (1984), and State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983), *cert. denied,* 104 S. Ct. 1930 (1984), in which robbery situations have been prosecuted based on the aggravating circumstance of the murder of a witness under N.M. Stat. Ann. § 31-20A-5(G) (Repl. Pamp. 1981).

29. Mandatory death penalty statutes have been deemed cruel as to some convicted murderers. Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

30. The possibility of imposition of different punishments for the same offense, based on the circumstances of the offense and the offender, was expressly approved by the Court in Woodson v. North Carolina, 428 U.S. 280 (1976), with the observation that mandatory sentencing "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass. . . ." *Id.* at 304.

The New Mexico Court of Appeals rejected an attack on the mandatory term of imprisonment imposed by the New Mexico Legislature for all non-capital, first degree felonies which was based

B. Consideration of the Offender

Once the prosecution establishes that the murder fits within the ambit of the death penalty statute, the sentencing authority then considers the accused personally as a factor in the sentencing process.[31] In this consideration, the sentencing authority must review and assess the mitigating effect of any evidence offered by the accused or present in the state's case-in-chief. The three approaches to capital sentencing discussed below[32] differ in the ways in which the sentencing authority considers the circumstances of the offense and the accused in arriving at the decision to impose the death penalty or a sentence of life imprisonment.

1. Aggravating Circumstances as a Threshold Inquiry

The first approach to capital sentencing is illustrated by the Georgia capital punishment statute.[33] The Georgia statute utilizes the allegations of "aggravating circumstances" as a threshold in the sentencing decision.[34] Those murders which are not committed under one of the statutory aggravating circumstances cannot be punished by death.[35] Once the state establishes that the threshhold inquiry has been met, the sentencing authority proceeds to consider the circumstances of the offense, together with evidence offered in mitigation, in deciding whether death should be imposed.

2. Aggravating Circumstances Weighed Against Mitigating Circumstances

The second approach, adopted by New Mexico[36] and other states,[37] requires the sentencing authority to weigh aggravating circumstances against mitigating circumstances raised by the evidence in deciding on the sentence. The states which have adopted this second approach essentially use the aggravating circumstances concept not only as a threshold for classifying murders into death sentence and non-death sentence cases,

on the argument that this mandatory sentencing scheme violates the sentencing principle expressed in *Woodson*. State v. Garcia, 100 N.M. 120, 126-27, 666 P.2d 1267, 1273 (Ct. App.), *cert. denied*, 100 N.M. 192, 668 P.2d 308 (1983).

31. The *Woodson* Court held that the eighth amendment "requires consideration of the character and record of the individual offender and the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the penalty of death." 428 U.S. at 304.

32. *See infra* notes 33-49 and accompanying text.

33. Ga. Code Ann. § 17-10-30 (1982); *see also* Zant v. Stephens, 103 S. Ct. 2733 (1983) (examining Georgia capital sentencing scheme).

34. *Zant*, 103 S. Ct. at 2744.

35. Ga. Code Ann. § 17-10-31 (1982).

36. N.M. Stat. Ann. § 31-20A-2(B) (Repl. Pamp. 1981) provides, in pertinent part: "After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment."

37. *E.g.*, Ark. Stat. Ann. § 41-1302(l) (1977); N.C. Gen. Stat. § 15A-2000(b) (Supp. 1981); Tenn. Code Ann. § 39-2-203(9) (1982); Wyo. Stat. § 6-4-102(d)(l) (Supp. 1982).

but also as factors which the sentencer must consider in making the punishment decision.[38]

The weighing process adopted by New Mexico requires the jury to weigh the aggravating circumstances against the mitigating circumstances.[39] The state must meet the burden of proving beyond a reasonable doubt that the mitigating circumstances do not outweigh the aggravating circumstances.[40] A failure of proof on this point results in imposition of a life sentence, because the applicable Uniform Jury Instruction, adopted by the New Mexico Supreme Court to implement the statute, precludes a verdict of death in such case.[41] This is, however, the limited extent of

38. As the Court noted in Zant v. Stephens, 103 S. Ct. 2733 (1983), death sentences have been set aside in states using the "weighing" approach when a statutory aggravating circumstance relied on for conviction and imposition of the death sentence has been declared unconstitutional. *Id.* at 2741 n.12. *See* Williams v. State, 274 Ark. 9, ___, 621 S.W.2d 686, 687 (1981); State v. Irwin, 304 N.C. 93, ___, 282 S.E.2d 439, 448-49 (1981); State v. Moore, 614 S.W.2d 348, 351-52 (Tenn. 1981); Hopkinson v. State, 632 P.2d 79, 90, 171-72 (Wyo. 1981).

39. N.M. Stat. Ann. §31-20A-2 (Repl. Pamp. 1981); N.M. U.J.I. Crim. 39.33. (Repl. Pamp. 1982). This uniform jury instruction required the sentencing jury to deliberate as follows:

> If you have unanimously agreed on a finding that [the aggravating circumstance charged was] [one or more of the aggravating circumstances charged were] present, you must then consider the penalty imposed in this case. In determining the penalty to be imposed, you must consider all of the evidence admitted during the sentencing proceeding and the evidence admitted during the trial in which the defendant was found guilty of murder, you must then consider whether there are any mitigating circumstances.
>
> If you find there are mitigating circumstances, you must then weigh the mitigating circumstances against [the aggravating circumstance] [one or more aggravating circumstances] you found in this case. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment. . . .

The supreme court amended this instruction, effective October 1, 1984, and renumbered the instruction as N.M. U.J.I. Crim. 39.34. (Cum. Supp. 1984). This instruction now provides:

> If you find any aggravating circumstance(s) that [was][were] charged you must weigh [that][those] aggravating circumstance(s) against any mitigation circumstances, [one or more aggravating circumstances][2] you have found in this case. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment. The aggravating circumstance(s) must outweigh the mitigating circumstances before the death penalty can be imposed.
>
> However, even if the aggravating circumstance(s) outweigh the mitigating circumstances, you may still set the penalty at life imprisonment.

The supplement does not include a Use Note, as the footnote would indicate, and the phrase bracketed and footnoted does not make sense in the context of the sentence.

40. N.M. U.J.I. Crim. 39.31 (Repl. Pamp. 1982), now renumbered as N.M. U.J.I. Crim. 39.30 (Cum. Supp. 1984), provides in pertinent part: "[T]he burden is always on the state to prove beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged and that the mitigating circumstances do not outweigh the aggravating circumstances. . . ."

41. *Id.* However, the other jury instructions relevant to this point, N.M. U.J.I. Crim. 39.32, 39.33 (Repl. Pamp. 1982), do not expressly address the jury's duty in the event the aggravating circumstances are outweighed by the mitigating circumstances or in the event the state fails to discharge its burden of showing, beyond a reasonable doubt, that the mitigating circumstances outweigh the aggravating circumstances.

Reviewing the instructions as a whole, this problem may arguably be solved by the jury's strict

the burden of proof placed upon the state because the applicable instructions do not require the state to prove beyond a reasonable doubt that death is the appropriate punishment.[42]

3. The Potential for Future Violent Behavior

The third approach, adopted by the Texas Legislature, never requires the jury to reach a sentencing verdict. Instead, the jury considers at least two, and possibly three, special issues. The first special issue requires the jury to make a finding on the culpability the actor demonstrated in committing the offense, a requirement suggesting that a greater degree of criminal intent is required for a capital than non-capital murder.[43] The second special issue focuses the jury's attention on the likelihood that the defendant will commit additional acts of criminal violence in the future.[44] The third special inquiry, given only if the evidence raises the issue, relates to provocation.[45] Unanimous affirmative answers to the special issues requires imposition of the death sentence.[46]

In contrast to those statutory schemes which rely upon aggravating circumstances as a factor to be weighed in the sentencing process, the

reference to N.M. U.J.I. Crim. 39.30 (Cum. Supp. 1984). N.M. U.J.I. Crim. 39.33 (Repl. Pamp. 1982) formerly provided, in pertinent part: "If you fail to unanimously agree that the death penalty should be imposed, a penalty of life imprisonment will be imposed by the court. . . ." However, in the amended instructions, the New Mexico Supreme Court has deleted this language explaining that a non-unanimious verdict will result in a life sentence. Moreover, the supreme court appears to have precluded a non-unanimous verdict being returned by the jury. N.M. U.J.I. Crim. 39.37, which sets forth the applicable verdict forms, provides only for a unanimous sentencing verdict. This approach violates the legislative intent of the statute, which clearly affords the defendant the benefit of a non-unanimous sentencing decision with a life sentence.

42. N.M. U.J.I. Crim. 39.30 (Cum. Supp. 1984) (quoted in part, *supra* note 40).

43. This reading is based on the requirement that the jury find a "deliberate" act, which is not required for proof of non-capital first degree murder. Tex. Crim. Proc. Code Ann. art. 37.071 (Vernon 1965) provides:

> (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. . . .

The Texas Court of Criminal Appeals held in King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977), *cert. denied,* 434 U.S. 1088 (1978), that there is no requirement that the trial court define "deliberately" in its instructions to the jury.

44. Subsection (b)(2) of article 37.071 provides that the jury be questioned on "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. . . ." Tex. Crim. Proc. Code Ann. art. 37.071 (Vernon 1965).

The court in King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977), *cert. denied,* 434 U.S. 1088 (1978), held that the terms "probability," "criminal acts of violence," and "continuing threat to society" did not require further definition. This section has generated considerable litigation, particularly based on the use of psychiatric testimony for expert prediction on the probability that the accused will commit further acts of criminal violence. *See* Barefoot v. Estelle, 103 S. Ct. 3383 (1983); Estelle v. Smith, 451 U.S. 454 (1981). *Cf.* Idaho Code § 19-2515(f)(8) (1979).

45. Tex. Crim. Proc. Code Ann. art. 37.071(b)(3) requires the jury to inquire "whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased" if the question is raised by the evidence.

46. Tex. Crim. Proc. Code Ann. art. 37.071(e) (Vernon 1965).

second issue posed under the Texas approach appears to be limited to the accused's prospects for rehabilitation.[47] It does not appear to open the door to an offer of mitigating evidence because, technically, the court charges the jury to return an affirmative answer if the state proves that the accused will probably commit acts of criminal violence in the future.[48] Explanation of or justification for the potential for violent behavior would not enter into the jury's finding unless the jurors deviated from strict consideration of the express intent of the special issue.[49]

C. Evidence of a Prior Criminal Record

In assessing the differing approaches to sentencing decisions, an important consideration in recognizing a capital defendant's right to make a plea for mercy lies in the potential usage of the defendant's prior criminal record in the sentencing process, particularly when the defendant elects to have the jury set punishment. If the state cannot affirmatively offer the record as a fact for the sentencing authority to consider, then it is important that the accused have an opportunity to address the jury without threat of exposing himself to impeachment through the use of his prior record. Otherwise, the accused would seldom chance the prejudice resulting from disclosure of the prior record in return for his opportunity to speak in open court. The New Mexico approach to capital sentencing does prohibit affirmative use of the prior record, making the plea for mercy a potentially valuable right.[50]

Under the Texas scheme, by contrast, the prior record of the defendant is both material and relevant for the jury's consideration of the probability that the accused will commit acts of criminal violence in the future.[51] Thus, irrespective of whether the defendant testifies, the state may offer the prior record affirmatively, provided that the trial court limits the jury's use of the record to those aspects of the prior record which truly reflect a propensity for violent criminal behavior.[52] Moreover, the Texas Court of Criminal Appeals has held that the state is not restricted to offering proof of felony convictions or convictions for violent offenses;[53] instead,

47. The requirement that the future acts of violence be "criminal" and that the accused pose a "continuing threat to society," *see supra* note 44, suggests non-amenability to rehabilitative techniques.

48. Nevertheless, even absent a consideration of mitigating factors, the Supreme Court held the Texas death penalty sentencing procedure constitutional in Jurek v. Texas, 428 U.S. 262, 269 (1976).

49. *See* Benson, *Texas Capital Sentencing Procedures after Eddings: Some Questions Regarding Constitutional Validity,* 23 So. Tex. L.J. 315 (1982).

50. *See* N.M. Stat. Ann. § 31-20A-5 (Repl. Pamp. 1981).

51. Roney v. State, 632 S.W.2d 598 (Tex. Crim. App. 1982).

52. *E.g.*, King v. State, 657 S.W.2d 109 (Tex. Crim. App. 1983). In *King*, the court reversed the defendant's death sentence, noting that the state had failed to show that prior burglaries introduced in the punishment stage involved personal violence.

53. In this sense, punishment evidence appears to follow both the theories of admissibility recognized by Evidence Rules 609 and 608(b). Garcia v. State, 581 S.W.2d 168 (Tex. Crim. App. 1979).

the court has deemed the facts of offenses committed,[54] charged,[55] or resulting in conviction[56] relevant to the jury's assessment.

Some states have adopted as a statutory aggravating circumstance the existence of a prior record of criminal activity.[57] The state may prove the facts underlying the prior record in meeting its burden of proof concerning the circumstance. The New Mexico statute, in contrast, provides that a defendant may rely upon the absence of a prior record of serious crime as a statutory mitigating circumstance.[58] Of course, if a defendant incorrectly attempts to rely on this mitigating circumstance, the state would probably be entitled to offer conflicting evidence to prove the existence of the prior record.[59] The trial court, upon defendant's motion, should determine this matter outside the presence of the jury, and assuming the evidence does not support the claimed mitigating circumstance, not instruct the jury on this point.[60]

54. Williams v. State, 622 S.W.2d 116 (Tex. Crim. App. 1981), *cert. denied*, 455 U.S. 1008 (1982) (evidence of unadjudicated, extraneous rapes properly admitted); Rumbaugh v. State, 629 S.W.2d 747 (Tex. Crim. App. 1982); *contra* State v. Bartholomew, 98 Wash. 2d 173, 654 P.2d 1170 (1982); *opinion on remand*, 101 Wash. 2d 631, 683 P.2d 1079 (1984). The *Bartholomew* court held unconstitutional Wash. Rev. Code § 10.95.060(3) (Supp. 1983), which authorized admission of evidence of prior, unadjudicated criminal conduct in capital sentencing proceedings. The court relied on state constitutional grounds in "declin(ing) to suspend in a capital case protections afforded all other criminal defendants." 101 Wash. 2d at ___, 683 P.2d at 1086.

55. Thus, where the defendant's confession included admission of other offenses, admission of the confession was deemed proper. Hamett v. State, 578 S.W.2d 699 (Tex. Crim. App. 1979), *petition dismissed*, 448 U.S. 725 (1980). Similarly, the court held that there was no error in admitting the indictment from a prior murder conviction, even though an indictment is generally not considered evidence. Bravo v. State, 627 S.W.2d 152 (Tex. Crim. App. 1982). In Green v. State, 587 S.W.2d 167 (Tex. Crim. App. 1979), the court held that no error was committed in proving that the accused had committed another, similar murder one month after commission of the offense for which he was being tried.

56. Davis v. State, 597 S.W.2d 358 (Tex. Crim. App.), *cert. denied*, 449 U.S. 976 (1980).

57. Examples of the different approaches adopted by other states are: Fla. Stat. Ann. § 921.141(5)(b) (West 1981) (prior conviction for violent felony); Idaho Code § 19-2515(f)(1) (1979) (prior murder conviction); Ind. Code Ann. §35-50-2-9(b)(7),(8) (Burns 1979) (prior murder conviction *or* proof of murder without conviction); Ky. Rev. Stat. § 532.025(2)(a)(1) (Supp. 1984) (prior convictions with substantial history of assaultive convictions); Mo. Rev. Stat. § 565.012-2(1) (Supp. 1982) (substantial prior record); and Va. Code § 19.2-264.2 (Supp. 1982) (prohibiting imposition of death penalty unless prior criminal record demonstrated and future possibility of repetition of crime shown).

58. N.M. Stat. Ann. § 31-20A-6(A) (Repl. Pamp. 1981); N.M. U.J.I. Crim. 39.33 (Cum. Supp. 1984). Many state statutes incorporate absence of a significant prior record or history of criminal activity as a statutory mitigating circumstance. *See supra* note 12 (citing state capital punishment statutes).

59. In such a case, the use of prior convictions would be appropriate not only to test the accused's credibility, but to demonstrate the inaccuracy of the testimony as to the "facts" regarding the accused's prior record. In State v. Maynard, 311 N.C. 1, 316 S.E.2d 197 (1984), the North Carolina court held that, where the defendant in the course of the capital sentencing proceeding testified that he had never been in trouble before, the door was opened to admission of two unrelated convictions in rebuttal.

60. Where the defense intends to assert lack of significant prior criminal activity and the issue is in doubt due to potentially conflicting evidence, particularly with regard to the interpretation to be given "significant" in this context, defense counsel should move to resolve the issue prior to trial.

Nevertheless, under the New Mexico statutory scheme, the prosecution cannot affirmatively use a prior record because the statute expressly limits the jury's consideration of aggravating circumstances to those set out in the statute.[61] Thus, under no circumstance could a properly instructed jury consider the accused's prior record for any purposes except: 1) to impeach a testifying defendant;[62] or 2) to evaluate the claimed mitigating factor of lack of a prior record of serious criminal activity.[63] The potential use of the prior record for impeachment, however, can chill the defendant's desire to make a personal statement to the jury because of his legitimate concern that disclosure of a prior record will influence the sentencer adversely.

II. THE CONSTITUTIONAL RIGHT TO PRESENT MITIGATING EVIDENCE

Because the concept of the personal statement or plea for mercy relates directly to a defensive strategy for avoiding the imposition of a sentence of death, it is closely allied with the general concept of mitigation as it applies in death penalty prosecutions.

In its landmark decision in *Furman v. Georgia*,[64] the Supreme Court invalidated existing death penalty statutes. The Court's plurality opinion focused on the arbitrary application of the penalty.[65] Rejecting the notion that the Court had absolutely held the death penalty constitutionally invalid, many states responded to *Furman* by enacting mandatory death penalty statutes which would apply the punishment uniformly to all persons convicted of committing certain categories of murder.[66] These states,

61. N.M. Stat. Ann. § 31-20A-5 (Repl. Pamp. 1981) provides in pertinent part: "The aggravating circumstances to be considered by the sentencing court or jury . . . are *limited* to the following. . . ." (Emphasis added.)

62. *See infra* Section V and accompanying notes (discussing impeachment with prior convictions).

63. In enacting § 31-20A-5, the legislature had the benefit of comparison to numerous state statutes in which prior criminal record is designated as a statutory aggravating circumstance. *See supra* note 57. Instead, the legislature expressly limited the aggravating circumstances set out in the statute, avoiding the problem of unconstitutional vagueness in the wording of the aggravating circumstance, such as that leading to the Georgia court's decision in Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976), holding this aggravating circumstance unconstitutional in part.

64. 408 U.S. 238 (1972).

65. The *Furman* majority split in its opposition to existing capital punishment statutes. Justice Douglas took the position that the death penalty had been discriminatorily applied and, thus, resulted in an unfair application of the punishment. 408 U.S. at 256-57. Justices Brennan and Marshall concluded that the death penalty was no longer constitutionally permissible based on their perceptions that evolving standards of decency precluded its use. *Id.* at 282. Justice Stewart voted with the plurality based on his conclusion that the death penalty was being arbitrarily or unfairly applied. Justice White, however, held the view that mandatory punishment would obviate the problem of "freakish" application of the death penalty which exists when only a relatively few murderers are sentenced to die. *Id.* at 310-14.

66. Louisiana, North Carolina, New Mexico (N.M. Stat. Ann. §40A-29-2 (Supp. 1975)), North Carolina, and Louisiana enacted mandatory death penalty statutory schemes. These statutes were voided on constitutional grounds. *See* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North

relying on Justice White's concurring opinion in *Furman*,[67] intended these statutes to prevent arbitrary application of capital punishment. Justice White had concluded that the source of the eighth amendment violation discerned by the plurality was attributable to the infrequency of application of the death penalty, which rendered execution an unlikely consequence of capital murder or rape.[68] Arguably, then, mandatory capital punishment cures the constitutional defect because it avoids an arbitrary application of the death penalty by treating all murderers within the capital class equally.

The mandatory sentencing approach fell, however, as the Court subsequently voided a series of state statutes.[69] The Court struck down the statutes because, under mandatory sentencing, no individual could prove himself deserving of a lesser sentence, despite evidence of an otherwise productive, peaceful life or of a strong indication of rehabilitation potential.[70] Thus, in *Lockett v. Ohio*,[71] the Court ruled that states must afford an accused facing the death penalty the opportunity to present evidence supporting a lesser sentence.[72] The Court reaffirmed this principle in *Eddings v. Oklahoma*.[73] It ruled that the sentencing authority in a death penalty case must consider individual factors in the accused's life which either would explain or excuse, in part, the behavior exhibited in the commission of the capital offense.

The factors the *Eddings* Court discussed are available as mitigating factors under the New Mexico sentencing scheme.[74] In New Mexico, the

Carolina, 428 U.S. 280 (1976); State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976). *See also* Hudson v. McAdory, 268 So.2d 916 (Miss. 1972) (Mississippi Supreme Court construed *Furman* to require mandatory sentencing for death penalty offenses); State v. Rumsey, 267 S.C. 236, 226 S.E.2d 894 (1976) (holding South Carolina's mandatory death penalty statute unconstitutional).

67. 408 U.S. at 311 (White, J., concurring).

68. *Id.* at 312-14. *See also* Justice White's separate opinion in Lockett v. Ohio, 438 U.S. 586 (1978): "I greatly fear that the effect of the Court's decision today will be to constitutionally compel a restoration of the state of affairs at the time *Furman* was decided . . . when the death penalty was generally reserved for those very few for whom society has least consideration." *Id.* at 623.

69. *See supra* note 66.

70. In Woodson v. North Carolina, 428 U.S. 280 (1976), the Court held that mandatory sentencing was constitutionally defective in failing to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. *Id.* at 303.

71. 438 U.S. 586 (1978).

72. *Id.* at 606-09; *see* Comment, Washington v. Strickland: *Defining Effective Assistance of Counsel at Capital Sentencing*, 83 Colum. L. Rev. 1544 (1983).

73. 455 U.S. 104 (1982).

74. The factors noted in *Eddings* as critical elements in mitigation are set out in N.M. U.J.I. Crim. 39.33 (Cum. Supp. 1984), which provides in pertinent part:

> You must also consider circumstances of the offense together with the character, emotional history and family history of the defendant and any other circumstances which you find to be mitigating.

This portion of the instruction is to be given, in whole or in part, as part of the general instruction on mitigation only if requested by the defendant. *See* Use Note 3. Formerly, this language had been incorporated in N.M. U.J.I. Crim. 39.30 (Repl. Pamp. 1982) and would not have been subject to tailoring to the evidence offered in individual cases at the discretion of the defense.

sentencer must consider statutory and non-statutory mitigating circumstances in the weighing process.[75] The accused in a New Mexico prosecution, therefore, is entitled to wide discretion in presenting mitigating evidence. This evidence falls generally into two broad categories: (1) the accused may rely on those factors which affirmatively demonstrate some character trait or prior activity which merit the jury's favorable consideration;[76] and (2) the accused may rely on those factors which may help to explain his behavior, such as a lack of capacity[77] or subjection to some influence limiting his freedom of decision.[78] The *Eddings*-type factors fall within the second category, as factors suggesting that the murder was in some sense a product of an unfavorable environment or circumstance essentially beyond the actor's control.

New Mexico has adopted an approach to mitigating factors which emphasizes the defense's right in the sentencing phase to counter the facts of the offense with evidence which might be immaterial in any other first degree prosecution. This type of evidence might prove admissible in other felony sentencing proceedings,[79] but limitations on judicial discretion in sentencing for non-capital, first degree offenses practically restrict the major thrust of such sentencing arguments to lesser offenses.[80] Of course, a trial court may rely on mitigating evidence in ordering sentences to be served concurrently, rather than consecutively, after conviction on multiple count offenses or upon multiple convictions.[81]

75. N.M. Stat. Ann. § 31-20A-6 (Repl. Pamp. 1981). But, in State v. Guzman, 100 N.M. 756, 676 P.2d 1321 (1984), the court held that the trial court had properly excluded the testimony of two experts who would have testified that, in their opinions, the defendant should not be sentenced to death because of his mental impairment. While testimony concerning the defendant's emotional and mental condition was properly before the jury, the court ruled that expert opinion on the suitability of death as a punishment would have essentially invaded the province of the jury. *Id.* at 763, 676 P.2d at 1328.

76. N.M. Stat. Ann. § 31-20A-6 (Repl. Pamp. 1981) provides, for instance, that the following factors are recognized as mitigating: the absence of a significant history of prior criminal activity; the likelihood that the defendant can be rehabilitated; the fact that the defendant cooperated with authorities; and the defendant's age.

77. *Id.* (*e.g.*, subsections (C) (defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired); (D) (the defendant was under the influence of mental or emotional disturbance); and (F) (the defendant acted under circumstances which tended to justify, excuse, or reduce the crime)).

78. *Id.* In particular, subsection (B) identifies, as a mitigating circumstance: the defendant acted under duress or under the domination of another person.

79. *See infra* Section III and accompanying notes (discussing allocution).

80. However, the trial court is still afforded discretion to consider evidence at sentencing in either increasing or decreasing the mandatory sentence by one-third. N.M. Stat. Ann. § 31-18-21 (1978). *See also* State v. Mead, 100 N.M. 498, 672 P.2d 1129 (1983), *reversing* 100 N.M. 23, 665 P.2d 289 (Ct. App. 1983)(supreme court reversed court of appeals holding statutorily authorized aggravation of sentences unconstitutional due to inadequate guidelines for exercise of trial court's discretion).

81. Cumulation orders are generally committed to the discretion of the trial court. However, N.M. Stat. Ann. § 31-18-21 (1978) requires cumulation of punishment for sentences imposed upon conviction for offenses committed by inmates or while at large under a deferred or suspended sentence or while on probation or parole.

The New Mexico statute, however, does not provide that the sentencing authority may only impose the death sentence upon a showing that death is the only appropriate sentence in the case.[82] Although a New Mexico court cannot impose death unless the state shows that the mitigating circumstances do not outweigh the aggravating circumstances beyond a reasonable doubt,[83] no burden of proof requires the state to show that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt.[84] This lack of a statutorily imposed burden of proof has been challenged,[85] based at least in part on a split among other state jurisdictions concerning the need to impose an affirmative burden of proof on the state in the sentencing process.[86]

The negative burden of proof demonstrates the importance of presenting mitigating evidence in the punishment phase of a death penalty trial. Because capital offenses often are not particularly difficult prosecutions in terms of evidence or theories of the offense, defense counsel frequently direct their entire energies at trial toward the sentencing phase in an effort to gain a life sentence.[87] Absent a truly contested case on the issue of

82. Thus, a jury might impose death based on its perception of the need to remove the accused from society when, in fact, a less restrictive means of achieving this goal—life imprisonment—might be satisfactory. This situation suggests a problem of constitutional dimension. *Cf.* Fla. Stat. Ann. § 921.141 (1981) (requiring the sentencing judge to impose a sentence of death only if it is an appropriate penalty in light of the aggravating and mitigating circumstances).

83. N.M. Stat. Ann. § 31-20A-4 (Repl. Pamp. 1981) provides, in pertinent part: "C. The death penalty shall not be imposed if . . . the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances. . . ." N.M. U.J.I. Crim. 39.31 (Repl. Pamp. 1982) provided, in pertinent part:

> The burden is always on the state to prove beyond a reasonable doubt that the murder was committed under one or more of the aggravating circumstances charged *and that the mitigating circumstances do not outweigh the aggravating circumstances.*

(Emphasis added.) In amending this instruction, now N.M. U.J.I. Crim. 39.34 (Cum. Supp. 1984), the supreme court added important language to direct the jury:

> However, even if the aggravating circumstance(s) outweigh the mitigating circumstances, you may still set the penalty at life imprisonment.

Id.

84. N.M. U.J.I. Crim. 39.33 (Repl. Pamp. 1982) only requires that the jury weigh the aggravating and mitigating circumstances against each other without imposing any burden of proof which the state must meet in order to show that the sentence of death is appropriate. The instruction does provide, however, that the death penalty cannot be imposed if the mitigating circumstances outweigh the aggravating circumstances.

85. In State v. Finnell, ___ N.M. ___, 688 P.2d 769 (1984), the court held that the proof "beyond a reasonable doubt" standard was not applicable to decisions to impose death under the New Mexico statute. *Cf.* Ybarra v. State, ___ Nev. ___, 679 P.2d 797 (1984) (Nevada Supreme Court declined to reverse or vacate a sentence of death where the aggravating and mitigating circumstances evidence was deemed equal).

86. *Compare* State v. Wood, 648 P.2d 71 (Utah 1982) (holding that burden upon state in capital sentencing proceeding is to show death appropriate in the case beyond a reasonable doubt), *with* State v. Bolder, 635 S.W.2d 673, 683-84 (Mo. 1982) (not requiring proof beyond a reasonable doubt standard for finding that death is appropriate punishment).

87. N.M. Stat. Ann. § 31-21-10A (Cum. Supp. 1984) authorizes parole for an inmate serving a life sentence as a result of conviction for a capital offense upon completion of thirty years of his sentence.

guilt or innocence, the right to present mitigating evidence is singularly important in death penalty cases.

III. THE RIGHT OF ALLOCUTION

Avoidance of the death penalty may largely rest on the jury's perception of the character and personal history of the defendant. Thus, an important aspect of the right to present mitigating evidence lies in the defense's ability to present the defendant to the jury in human terms. Often, the defense succeeds by affording the defendant the opportunity to address the jury and offer personal reasons why it should impose a life sentence, rather than death. This type of address is traditionally reflected in the right of allocution.

Our jurisprudence has long recognized the right of the prisoner to speak in his own behalf at the time of sentencing.[88] *Black's Law Dictionary* defines allocution, or *allocutus*, as:

> Formality of court's inquiry of prisoner as to whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction.[89]

This common law definition stresses the legality of exercise of jurisdiction as the basis of allocution,[90] rather than the right to present evidence in mitigation of punishment. The former suggests a jurisdictional impediment to imposition of sentence, while the latter focuses upon the court's discretion in setting the punishment. One commentator, for example, in discussing the significant stages of the criminal process at which the accused's incompetence may affect the power of the court to exercise jurisdiction, notes that one of the five critical stages is "the time of allocution, for he [the accused] must not be required to answer whether he knows of any reason why judgment should not be pronounced against him if he is incapable of understanding the question. . . ."[91] While the common law may have strictly limited the doctrine to the right of the accused to interpose any legal bar to pronouncement and execution of

88. *See* Green v. United States, 365 U.S. 301 (1961). Justice Frankfurter, writing for the majority, noted: "As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal." *Id.* at 304.

89. Black's Law Dictionary 70 (rev. 5th ed. 1979).

90. In this context allocution reflects the same legal concern as a motion in arrest of judgment. *See, e.g.*, Tex. Code Crim. Proc., art. 41.01 (Vernon 1965): "A motion in arrest of judgment is an oral or written suggestion to the court on the part of defendant that judgment has not been legally rendered against him. The record must show the grounds of the motion."

91. J. Perkins, Criminal Law 854 (2d ed. 1969).

sentence, allocution has evolved as a legal concept relating to the accused's right to make a personal plea for mitigation of punishment.[92]

As applied in capital cases, the right of allocution afforded a capital defendant forced to proceed without the benefit of counsel the opportunity to express any reason why the court should not pronounce sentence after conviction.[93] New Mexico recognized the right as essential in capital cases in *Territory v. Herrera*.[94] In *State v. Jones*,[95] the New Mexico Supreme Court limited the right of allocation to capital cases.[96] The court subsequently extended the right of the defendant to speak before sentencing to all sentencing proceedings, capital or non-capital, in *Tomlinson v. State*.[97] There, the New Mexico Supreme Court held that the legislature had extended the common law right of allocution to non-capital pro-

92. Green v. United States, 365 U.S. 301 (1961). "None of these modern innovations [right to testify, right to counsel] lessens the need for the defendant, personally to have the opportunity to present to the court his plea in mitigation." *Id.* at 304.

The right of allocution is frequently a statutory-based right in American jurisdictions. *E.g.*, Izzard v. State, 663 S.W.2d 192, 195 (Ark. Ct. App. 1984) (no violation of right of allocution extended by Ark. Stat. Ann. § 43-2303 (1977) where accused opted not to make statement); People v. Gistover, 131 Mich. App. 313, 345 N.W.2d 703, 704 (1984) (holding trial court sufficiently complied with statutory directive to afford accused allocution); *but see* Bowles v. State, 168 Ga. App. 763, 310 S.E.2d 250, 253 (1983) (no statutory right of allocution in misdemeanor sentencing procedure).

Allocution is recognized as a defendant's right in federal prosecutions, *see* United States v. Cuevas-Ramirez, 733 F.2d 731 (10th Cir. 1984), and has been construed—or misconstrued—as the right of the government to present a sentencing argument as well. *See* United States v. Santarelli, 729 F.2d 1388 (11th Cir. 1984) (applying Fed. R. Crim. P. 32); Brown v. United States, 474 A.2d 161, 164 (D.C. App. 1984) (applying D.C. Super. Ct. Crim. R. 32).

93. Ball v. United States, 140 U.S. 118 (1891); Fielden v. People, 128 Ill. 595, 21 N.E. 584 (1889). In reviewing the capital sentencing process in a pre-*Furman* decision, the Supreme Court observed:

> Appellant was found guilty after a fairly conducted trial. His sentence followed a hearing conducted by the judge. *Upon the judge's inquiry as to why sentence should not be imposed, the defendant made statements.* His counsel made extended arguments. The case went to the highest court in the state, and that court had power to reverse for abuse of discretion or legal error in the imposition of the sentence. That court affirmed. We hold that appellant was not denied due process of law.

Williams v. New York, 337 U.S. 241, 252 (1949) (emphasis added).

94. 11 N.M. 129, 66 P. 523 (1901); *accord* United States v. Sena, 15 N.M. 187, 106 P. 383 (1909). In State v. Ybarra, 24 N.M. 413, 174 P. 212 (1918), the court held that, where the trial court did not afford the defendant his right to speak upon conviction for a capital offense, the proper disposition was to remand the cause to the trial court to permit the defendant to make his plea. *See also* State v. Nicoletti, ___ R.I. ___, 471 A.2d 613 (1984); Smith v. State, 257 Ark. 781, 520 S.W.2d 301 (1975) (both reversing for failure to afford accused right of allocution).

For an interesting decision involving a capital sentencing procedure, including the role of allocution, see State v. Creech, 105 Idaho 362, ___, 670 P.2d 463, 513 (1983) (opinion of Bistline, J., on denial of petition for rehearing).

95. 34 N.M. 499, 285 P. 501 (1930).

96. *Id.*

97. 98 N.M. 213, 647 P.2d 415 (1982).

ceedings by enacting section 31-18-15.1, which provides: "A. The Court shall hold a sentencing hearing to determine if mitigating or aggravating circumstances exist and take whatever evidence or statements it deems will aid it in reaching a decision. . . ."[98]

The *Tomlinson* court inferred that the legislature was aware of the doctrine in enacting the statute and construed "shall" as mandatorily requiring a sentencing hearing,[99] including the right of the accused to speak in his own behalf[100] in every felony sentencing proceeding. The court also concluded, significantly, that failure to permit the defendant to speak prior to sentencing could not be deemed harmless error.[101]

In so holding, the court relied on the language of the Alaska and Colorado Supreme Courts in their consideration of the same question. In *Mohn v. State*,[102] the Alaska court noted: "[T]here is no substitute for the impact on sentencing which a defendant's own words might have if he chooses to make a statement."[103] The Colorado court advanced a similar expression:

> A defendant must be notified when sentence will be pronounced, and has a right to be present in the court with legal counsel at that time. He has a right of allocution before sentence is handed down which cannot be withheld from him. Failure of the court to properly insure these rights of a defendant renders invalid a sentence pronounced under those circumstances.[104]

98. The *Tomlinson* court construed the language of N.M. Stat. Ann. § 31-18-15.1 (1978) to require the trial court to hold a sentencing hearing in every case, relying on the traditional construction of "shall" as mandatory unless contrary to the legislative intent expressed in the statute. *See* Security Trust v. Smith, 93 N.M. 35, 37, 596 P.2d 248, 250 (1979).

99. The court observed that the Maryland court had similarly construed "shall" as mandatory and that the applicable Maryland rule required *allocutus* in every sentencing hearing. Wright v. State, 24 Md. App. 309, 330 A.2d 482 (1975); *accord* Erickson v. City and County of Denver, 179 Colo. 412, 500 P.2d 1183 (1972).

100. *Tomlinson*, 98 N.M. at 215. "[T]he trial judge must give the defendant an opportunity to speak *before* he pronounces sentence." (Emphasis in original.)

101. *Id.* In response to the state's argument that the defendant in *Tomlinson* was afforded an opportunity to speak after imposition of sentence, the court characterized this as an "empty gesture." The court relied on State ex rel. Kahn v. Tahash, 274 Minn. 567, 144 N.W.2d 262 (1966). *See also* Sellman v. State, 47 Md. 510, 423 A.2d 974 (1981) (trial court denied defendant's request to speak prior to imposition of sentence; appellate court reversed and remanded for resentencing, noting that the trial court could lessen defendant's sentence after hearing him speak); State v. Nicoletti, ___ R.I. ___, 471 A.2d 613 (1984) (the Rhode Island Supreme Court observed: "The fact that the trial justice had a presentence report before him and afforded the defendant the opportunity to speak after the pronouncement is not sufficient. . . .").

102. 584 P.2d 40 (Alaska 1978).

103. *Id.* at 44.

104. People v. Emig, 117 Colo. 174, ___, 493 P.2d 368, 369-70 (1972). *But see* Tenon v. State, 563 S.W.2d 622 (Tex. Crim. App. 1978) (trial court's failure to inquire of defendant concerning any reason why sentence should not be pronounced did not require reversal).

Extending New Mexico case law on the application of the right, the court of appeals, in *State v. Case*,[105] held that an accused convicted of criminal contempt of court has a right of allocution prior to sentencing.[106] Similarly, the defendant may speak prior to imposition of sentence in federal prosecutions as a matter of statutory right.[107] In *United States v. Behrens*,[108] the Supreme Court held that the trial court erred in imposing sentence in the absence of the defendant and his counsel. The Court pointed out that the right of the defendant to "make a statement to the judge in his own behalf is of most importance" and characterized the right as "ancient in the law."[109]

Although *Tomlinson* affirmed that the right of allocution extends to all felony sentencing proceedings, the New Mexico Supreme Court has yet to define the proper role of allocution in capital sentencing proceedings.[110] The court must clearly define that role in future decisions because death penalty sentencing proceedings differ from other felony sentencing hearings. Currently, allocution is limited to the right to make a statement prior to the formal imposition of the sentence by the trial judge; it has yet to be formally extended to encompass the right to make a personal statement to the jury prior to the time that the jury retires to deliberate on sentencing. Reserving the right of allocution to address the trial court before formal pronouncement of sentence clearly fails to accomplish the goal intended by the court in *Tomlinson*,[111] because the court has interpreted the statute to deny the trial court power to alter a jury-imposed sentence.[112] In *State v. Guzman*,[113] the defendant contended that the supreme court should give

105. 100 N.M. 173, 667 P.2d 978 (Ct. App. 1983).

106. *Id.* at 178, 667 P.2d at 983. *Case* follows *Taylor v. Hayes*, 418 U.S. 488 (1974), in which the United States Supreme Court, reviewing the law of criminal contempt, observed that even in summary proceedings the trial court must afford the contemnor the opportunity to speak in his own behalf in the nature of allocution before the court imposes sentence. *Id.* at 498. *See also* Ex parte Avila, 659 S.W.2d 443 (Tex. Crim. App. 1983) (en banc) (the court, following *Taylor*, upheld ruling holding attorney in contempt of court for failure to appear for trial setting).

107. Fed. R. Crim. P. 32(a)(1)(c).

108. 375 U.S. 162 (1963).

109. *Id.* at 165.

110. The issue was not raised in any one of the first four New Mexico post-*Eddings* death penalty decisions to date: State v. Cheadle, 101 N.M. 282, 681 P.2d 708 (1983), *cert. denied*, 104 S. Ct. 1930 (1984); State v. Guzman, 100 N.M. 756, 676 P.2d 1321, *cert. denied*, 104 S. Ct. 3548 (1984); State v. Gilbert, 100 N.M. 392, 671 P.2d 640 (1983), *cert. denied*, 104 S. Ct. 1429 (1984); State v. Garcia, 99 N.M. 771, 664 P.2d 969, *cert. denied*, 103 S. Ct. 2464 (1983).

111. 98 N.M. at 215, 647 P.2d at 417. The reason is that reserving the right to speak until imposition of sentence would be too late in the proceedings to permit jury consideration of the accused's statement prior to its deliberations on punishment; the "right" would prove to be the "empty gesture" condemned by the *Tomlinson* court.

112. *Id. See* N.M. Stat. Ann. § 31-20A-3 (Repl. Pamp. 1981).

113. 100 N.M. 756, 676 P.2d 1321 (1984).

effect to the trial court's finding on the record, contrary to the jury's conclusion, that the mitigating circumstances outweighed the aggravating circumstances. The supreme court rejected the argument on the ground that the statute precluded the trial court from imposing any punishment other than that which the sentencing jury set after its deliberations.[114] If the court were to limit allocution in the capital context to legal objection to the imposition of sentence, then the right would appear meaningless in light of the limitation placed upon the trial court to alter the jury's judgment.

Tomlinson holds, however, that allocution is not limited to the assertion of legal bars to the imposition of a sentence. Instead, it provides the accused an opportunity to participate in the sentencing process by making a personal plea for mitigation of punishment.[115] Because the jury, at the option of the accused,[116] may set punishment in New Mexico death penalty prosecutions, the logic of *Tomlinson* and its historical review of the right in New Mexico jurisprudence establish that the right of allocution entitles the defendant to make his personal statement or plea to the jury which will decide his fate. The jury bases its decision on a weighing of the aggravating and mitigating circumstances proved in the case[117] and considers the defendant and the crime in making its decision,[118] yet always retains authority to impose a life sentence despite the results of the weighing process.[119] Thus, New Mexico law appears to require that the accused be allowed to make some type of personal statement or plea to the jury which will decide whether he will be sentenced to death.[120] This requirement is necessary if the right of allocution is to be meaningfully applied in capital sentencing proceedings.

IV. THE PLEA FOR MERCY OR PERSONAL STATEMENT OF THE CAPITAL DEFENDANT

The plea for mercy or personal statement arises from the right of allocution and the constitutional right of the accused to offer mitigating evidence in a capital sentencing proceeding. Once the accused elects to have the jury set his punishment, his plea should be made to the jury prior to its deliberations and not to the trial court, which merely pro-

114. *Id.* at 763, 676 P.2d at 1328.

115. 98 N.M. at 215, 647 P.2d at 417.

116. N.M. Stat. Ann. § 31-20A-1B (Repl. Pamp. 1981). The defendant may elect to be sentenced by the court but in no instance known to the author has a defendant accused of a capital offense elected to have his punishment assessed by the trial court.

117. N.M. Stat. Ann. § 31-20A-2(B) (Repl. Pamp. 1981); N.M. U.J.I. Crim. 39.33 (Repl. Pamp. 1982), amended and renumbered as N.M. U.J.I. Crim. 39.34 (Cum. Supp. 1984).

118. *Id.*

119. N.M. U.J.I. Crim. 39.34 (Cum. Supp. 1984).

120. *See supra* notes 94-101 and accompanying text.

nounces sentence after the jury returns the verdict. The plea will likely prove an important factor in the jury's evaluation of the accused and appropriateness of capital punishment in his case.

The New Mexico Constitution provides, in pertinent part:

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.[121]

This provision should be construed to provide that a capital defendant has every legitimate means available for "defending life and liberty," including the right to address his sentencer personally.[122] The severity of the death penalty and the unequivocal nature of the right guaranteed by the constitution suggest that the state cannot seek the death penalty without affording the defendant an opportunity to plead for mercy without fear of reprisal by disclosure of his prior criminal record.

Additionally, the concept of due process, the right to present a defense, and the protection against infliction of arbitrary, severe punishment guaranteed by the fifth, sixth and eighth amendments logically embrace the right of the capital defendant to make a personal plea for his life. Assuming that the sentencing decision rests on the persuasiveness with which the defendant makes his plea, compromising his right to speak with the threat of impeachment with his prior criminal record may serve to deprive him of the best, or only, defense against the death penalty.

The New Mexico capital sentencing scheme provides that the jury not only weigh aggravating and mitigating circumstances in setting punishment, but that it also consider the "defendant and the crime" in its deliberations.[123] Clearly, the evidence at trial will fully set forth the circumstances of the offense for the jury's review. In fact, the court instructs the jury to consider all the evidence admitted at the trial in making its punishment decision.[124]

The instruction relating to consideration of the "defendant" is sufficiently broad to permit the jury to consider both the facts adduced as

121. N.M. Const. art. II, § 4.

122. The right to defend against deprivation of life or liberty by legal means is also expressly encompassed by the guarantees of N.M. Const. art. II, § 14. Similarly, the right to defend life or liberty physically is implied by the language of N.M. Const. art. II, § 6, which guarantees the right of New Mexicans to keep and bear firearms for personal use.

123. N.M. Stat. Ann. § 31-20A-1(C) (Repl. Pamp. 1981); N.M. U.J.I. Crim. 39.34 (Cum. Supp. 1984).

124. N.M. Stat. Ann. § 31-20A-1(C) (Repl. Pamp. 1981); N.M. U.J.I. Crim. 39.12, 39.32, 39.33 (Cum. Supp. 1984). The amended jury instructions adopted by the supreme court, effective October 1, 1984, now instruct the jury to consider trial evidence in the punishment phase only in N.M. U.J.I. Crim. 39.12.

evidence of mitigating circumstances,[125] and non-mitigating facts.[126] Consideration of the "defendant and the crime," however, does not permit the jury, while engaging in the weighing process, to consider factors not set out in the statute as aggravating circumstances.[127] Thus, the instruction expands the jury's consideration of factors favorable to the accused[128] while restricting the jury's examination of unfavorable factors. The plea for mercy or personal statement is the type of factor the Uniform Jury Instructions embrace and upon which the jury might rest a decision to impose a life sentence, rather than death.

V. IMPEACHMENT OF A PLEADING DEFENDANT WITH PRIOR CONVICTIONS

The federal[129] and state constitutions[130] impliedly guarantee the accused's right to testify. The potential for impeachment with prior convictions[131] or bad acts under Rule 608(b) of the New Mexico Rules of Evidence[132] often compromises the exercise of this right.[133] While

125. N.M. U.J.I. Crim. 39.33 (Cum. Supp. 1984) instructs the jury to consider any mitigating circumstances demonstrated by the evidence, which are not limited to the statutory mitigating circumstances set forth in N.M. Stat. Ann. § 31-20A-6 (Repl. Pamp. 1981).

126. A "non-mitigating fact" demonstrated at trial might involve the conduct or personality of the accused displayed in the commission of the offense, such as a display of sadism or depravity.

127. N.M. Stat. Ann. § 31-20A-5 (Repl. Pamp. 1981). *Contra* Ga. Code Ann. § 17-10-30 (1982); Mo. Rev. Stat. § 565.012(3) (Supp. 1982) (expressly authorizing jury to consider non-statutory aggravating circumstances).

128. N.M. U.J.I. Crim. 39.30 (Repl. Pamp. 1982) instructed the jury to consider, in addition to the statutory mitigating and non-statutory mitigating circumstances, the "character, emotional history and family history of the defendant." The amended instruction, N.M. U.J.I. Crim. 39.33 (Cum. Supp. 1984), provides that these elements of mitigation are only to be included in the instruction if raised by the evidence and requested by the defense. *See id.* Use Notes 2 and 3. This instruction comports with the United States Supreme Court decision in Eddings v. Oklahoma, 455 U.S. 104 (1982).

129. U.S. Const. amends. V, VI.

130. N.M. Const. art. II, § 14.

131. Juries are, for example, more likely to convict a defendant who has a prior criminal record. *See* H. Kalven & H. Ziesel, The American Jury 146, 160-69 (1966).

132. Of course under Rule 608(b), the impeachment evidence is limited by rule to those acts deemed probative of untruthfulness. However, New Mexico courts have tended to view "untruthfulness" broadly, equating that concept with "dishonesty," as provided in Rule 609(a)(2). *See* State v. Miller, 92 N.M. 520, 590 P.2d 1175 (Ct. App. 1979); State v. Melendrez, 91 N.M. 259, 572 P.2d 1267 (Ct. App. 1977). In *Miller,* the court held that acts of dishonesty were proper subjects for impeachment under Rule 608(b) as probative of untruthfulness. 92 N.M. at 522, 590 P.2d at 1117. But see Rhodes v. State, 267 Ark. 278, ___, 634 S.W.2d 107, 110 (1982) (court held that state's witness in a capital murder prosecution could not be cross-examined on his prior acts of shoplifting). The *Rhodes* court read Arkansas Evidence Rule 608(b) "to limit the inquiry on cross-examination to specific instances of misconduct clearly probative of truthfulness or untruthfulness as distinguished from conduct probative of dishonesty."

The New Mexico Supreme Court may well have expanded the basis for Rule 608(b) impeachment in State v. Worley, 100 N.M. 720, 676 P.2d 247 (1984). *See infra* note 151.

133. *See, e.g.,* Albrecht v. State, 486 S.W.2d 97 (Tex. Crim. App. 1972). Interestingly, however, the Texas death penalty statute appears to authorize a sentence of death based on the accused's history of generally being a criminal. *See* Tex. Code Crim. Proc. Ann. § 37.071 (Vernon 1965).

impeachment with either may have legitimate value, this evidence nevertheless may improperly serve to suggest that the accused is generally a criminal which is not a proper reason for imposing the death sentence under the New Mexico statute. Once admitted for purposes of impeachment, evidence of prior convictions or bad acts may well jeopardize a defendant whose mitigating evidence is already weak. It may also serve to undermine an otherwise strong punishment defense significantly.

The failure to testify itself may result in a negative reaction from the jury. Expression of personal regret, tone of voice, and ability to develop a personal response within individual jurors may prove important factors in the jury's eventual decision concerning the punishment it will impose. Exercise of the right to remain silent, an important decision in terms of trial and appellate strategy, may prove correct in terms of avoiding negative evidence[134] or waiver of error.[135] It also may have the result of insulating the jury from the accused and isolating its sentencing decision from the fact that the death sentence, if imposed, will actually result in execution of a fellow human being.

The justification for barring the state from impeaching the allocuting or pleading capital defendant with his prior record of conviction lies in the distinction between the accused giving testimony in his own behalf and the accused making a plea for mercy. In the first instance, the testimony is offered either to dispute a fact in issue at trial or to offer evidence of another fact which the accused advances defensively. For example, the accused may offer an alibi defense and deny commission of the offense, or may offer evidence that he was present but insane at the time of the offense. These types of facts are subject to rebuttal and form the basis for disputed issues which the trier of fact must resolve and, therefore, justify impeachment.

In contrast, the accused making a plea for mercy does not intend to advance or to dispute facts, but instead uses the plea to ask for lenience or understanding in the sentencer's decision. If the accused does not stray from this subject matter in his statement, the plea made does not justify traditional impeachment.

Generally, a criminal defendant choosing to testify in his own behalf is treated as any other witness with respect to the right of the prosecution

134. For example, once an accused takes the stand, he may be impeached by prior statements made against his penal interest, even including confessions which might otherwise be inadmissible. *See* Harris v. New York, 401 U.S. 222 (1971).

135. Error may be waived when the accused testifies and admits facts which should otherwise have been excluded from the jury's consideration. For instance, once an accused testifies he opens the door to general attack on his credibility as a witness. State v. Guess, 98 N.M. 438, 440, 649 P.2d 506, 508 (Ct. App. 1982). The opinion or reputation testimony of other witnesses as to this particular character trait of the accused would otherwise be inadmissible; upon taking the stand any error in admitting this testimony from other witnesses would be waived.

to cross-examine and impeach through use of extrinsic evidence.[136] The prosecutor may use the prior record of the defendant's convictions to impeach the defendant's testimony, for instance.[137] Rule 609(a) of the New Mexico Rules of Evidence permits the use of prior convictions as impeachment under the following terms:

> *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting the evidence outweighs the prejudicial effort to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.[138]

The rule requires the trial judge to weigh the probative value of the evidence against its prejudicial effect in determining whether to admit the prior conviction.[139] In practical terms, an appellate court will not disturb the decision to permit the use of valid prior convictions for impeachment, even if the record does not demonstrate affirmatively that

136. Jenkins v. Anderson, 447 U.S. 231 (1980); State v. Guess, 98 N.M. 438, 649 P.2d 506 (Ct. App. 1982); State v. Lindsey, 81 N.M. 173, 414 P.2d 903 (Ct. App. 1969), *cert. denied,* 398 U.S. 904 (1970); N.M. R. Evid. 609.

137. In viewing the testifying defendant, the New Mexico Court of Appeals has urged a judicious evaluation of use of prior acts of misconduct before permitting use of these acts as impeachment evidence:

> Where the witness is the defendant . . . [t]he trial court . . . should limit the cross examination where its legitimate probative value on the credibility of the accused as a witness seems obviously outweighed by its illegitimate tendency, effect and often purpose, to prejudice him as a defendant.

State v. McFerran, 80 N.M. 622, 626, 459 P.2d 148, 152 (Ct. App. 1969) (citing State v. Holden, 45 N.M. 147, 160, 113 P.2d 171, 179 (1941)). *But see* State v. Worley, 100 N.M. 720, 723, 676 P.2d 247, 250 (1984) (court held that impeachment of a witness based on prior commission of criminal sexual contact was proper, reasoning that prior commission of a similar offense would reflect on the credibility of a witness testifying for an accused charged with a sex offense).

138. N.M. R. Evid. 609.

139. *See generally* State v. Coca, 80 N.M. 95, 451 P.2d 999 (Ct. App. 1969) (suggesting that the record must demonstrate that the trial judge did, in fact, engage in the weighing process before admitting the evidence); *accord* State v. Jones, 101 Wash. 2d 113, 677 P.2d 131 (1984):

> Without a statement of reasons demonstrating that the trial court did engage in a balancing analysis it is impossible for an appellate court to evaluate the trial court's decision. Therefore, what was suggested in *Thompson* [95 Wash. 2d 393, 632 P.2d 50 (1981)], we now make mandatory: that is, a trial court must state, for the record, the factors which favor admission or exclusion of prior conviction evidence.

Id. at ___, 677 P.2d at 137. The weighing of probative value against prejudice follows the general rule set out in N.M. R. Evid. 403, which provides that any evidence may be excluded where its prejudicial impact outweighs its probative value, where it may result in confusion or misdirection of the jury, or where it may result in undue delay in the proceedings.

such a weighing process actually took place.[140] New Mexico law limits the extent of an impeachment inquiry to the fact of the prior conviction and the name of the offense.[141] The law limits the relevant scope of the evidence to the actual judgment of conviction, rather than to underlying facts of the offenses which might be highly relevant in many instances.[142] Thus, a trial court generally may not admit the facts surrounding commission of a particularly brutal murder, even though it may permit the state to prove that the witness had been convicted of the murder. These facts may be admissible, of course, under the framework of New Mexico Rule of Evidence 404(b), which authorizes use of evidence from other offenses of similar character to establish elements or circumstances tending to show the defendant's guilt in a subsequent prosecution.[143]

Rule 609(b) sets a second limitation on the use of prior convictions for impeachment purposes.[144] This provision recognizes a bar on use of

140. State v. Sibold, 83 N.M. 678, 496 P.2d 738 (Ct. App. 1972) (trial court's exercise of discretion not disturbed on appeal unless judge's action can be characterized as erroneous, arbitrary, and unwarranted); State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966).

141. *See* State v. Coca, 80 N.M. 95, 97, 451 P.2d 999, 1001 (Ct. App. 1969) (citing New Mexico authorities); State v. Ocanas, 61 N.M. 484, 303 P.2d 390 (1956).

142. For instance, an accused's prior record might reveal factually similar offenses tending to suggest a propensity to commit crimes in a recognizable fashion. Unless admissible under evidence Rule 404(b), the facts of these prior offenses would likely prove so inherently prejudicial as to preclude a fair trial. The Washington court in State v. Jones, 101 Wash. 2d 113, 677 P.2d 131 (1984), observed: "It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again. The prejudice is even greater when the prior conviction is similar to the crime for which the defendant is being tried." *Id.* at ___, 677 P.2d at 136 (citing State v. Pam, 98 Wash. 2d 748, 760, 659 P.2d 454, 460 (1983) (Utter, J., concurring)).

Similarly, the Fifth Circuit Court of Appeals observed in Railton v. United States, 127 F.2d 691 (5th Cir. 1942):

> It is logical to conclude, and very apt to be concluded, that because a man was dishonest once he will steal again. It is certainly 'more probable' that a crooked official did steal than if he were an upright one. Yet our law forbids these very premises. It cannot be shown that the accused has committed other similar crimes to show that it is probable he committed the one charged.

Id. at 693.

Of course, this type of reasoning is the basis for a significant aspect of the Texas death penalty scheme—the special issue focusing on the probability that the accused would commit acts of criminal violence in the future. *See supra* notes 44, 51-56 and accompanying text.

143. Generally, N.M. R. Evid. 404(b) permits the proponent of evidence showing commission of extraneous offenses to offer such evidence to prove an element of its case where the element can only be shown inferentially. The evidence is relevant if the two offenses are sufficiently similar in pertinent characteristics to permit a reasonable inference to be drawn with respect to the motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of motive or mistake on the part of the actor. State v. Marquez, 87 N.M. 56, 529 P.2d 283 (Ct. App.), *cert. denied*, 87 N.M. 47, 529 P.2d 273 (1974); State v. Lopez, 85 N.M. 742, 516 P.2d 1125 (Ct. App. 1973).

144. N.M. R. Evid. 609(b). This provision sets ten years as an arbitrary limitation based on the notion that the older the conviction, the less probative it is of the testifying defendant's or other witness' credibility. United States v. Hayes, 553 F.2d 824 (2nd Cir.), *cert. denied*, 434 U.S. 867 (1977). If time is the critical factor in the analysis underlying Rule 609(b), it would appear that the date of offense—rather than conviction or last date of incarceration—should be the logical starting point for computation of the ten year period.

convictions older than ten years from the date that the accused was discharged from custody, or from the date of conviction if he was not incarcerated, in a subsequent proceeding.

The rationale behind Rule 609 appears to be that evidence of prior criminal conduct resulting in conviction at the felony level inherently suggests the probable dishonesty of the accused in testifying.[145] Certainly, in light of the potential application of enhanced punishment,[146] the testifying accused has a motivation for avoiding conviction, even at the expense of committing perjury.[147] The rule, however, does not advance this rationale for holding priors admissible as a basis for impeachment; it merely distinguishes between felonies and other crimes which involve dishonesty or fraud.[148] Thus, the rule limits use of non-felony convictions for impeachment to the latter category of offenses,[149] which bear some relationship to the espoused justification for impeachment.[150] Absent this distinction at the felony level, it appears that the true theory for impeachment with a prior record lies in the fact that the conviction makes a statement about the character of the witness.[151] As the New Hampshire court candidly observed in *State v. Duke:*[152] "No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. In transactions of everyday life this is probably the first thing they would wish to know."[153] The *Duke* court might well have been correct in its conclusion. The logic of this justification for admission of prior convictions, however, breaks down at the point where the jury relies on past criminality, rather than the evidence adduced at trial, as its basis for conviction.[154]

145. *See* J. Weinstein & M. Berger, Weinstein's Evidence ¶609[02]-[04] (1982).

146. N.M. Stat. Ann. §31-18-17 (Cum. Supp. 1984) provides for habitual offender penalties of one, four, or eight years based on one, two, or three or more prior felony convictions, respectively. Moreover, the enhanced punishment may be applied to each count upon which conviction is obtained and these sentences may be ordered served consecutively. State v. Harris, 101 N.M. 12, 20-21, 677 P.2d 625, 633-34 (Ct. App. 1984).

147. The penalty for perjury as set by N.M. Stat. Ann. §30-25-1 (1978) is 18 months, the statutory punishment for a fourth degree felony.

148. N.M. R. Evid. 609(a)(l) permits impeachment with any felony, subject to the trial court's exercise of discretion.

149. N.M. R. Evid. 609(a)(2).

150. The misdemeanor provision looks directly to whether the prior conviction could be said to reflect conduct truly evidencing a tendency toward dishonesty or mendacity.

151. *See* State v. Worley, 100 N.M. 720, 676 P.2d 247 (1984). In *Worley,* the court held that the witness' prior commission of the offense of criminal sexual penetration was admissible to impeach his testimony in defendant's rape-murder trial, imputing to the witness a motive to lie based on his own history of similar criminal behavior.

152. 100 N.H. 292, 123 A.2d 745 (1956).

153. *Id.* at ___, 123 A.2d at 746.

154. In Boyd v. United States, 142 U.S. 450 (1892), Mr. Justice Harlan observed the dangers inherent in admission of prior offenses in a criminal prosecution:

> Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not

As long as the testifying defendant in a capital prosecution is asserting facts in issue in either the guilt/innocence or punishment stages of trial,[155] the theoretical foundation of Rule 609(a) may well remain valid—even though it is difficult to understand why the arbitrary ten-year limitation imposed by Rule 609(b) is justified, because such a bar will have little relationship to the reliability of the testimony or the witness.[156] However, in the event the defendant merely seeks to make a statement or a plea requesting the jury's mercy or consideration in setting punishment, the justification for permitting impeachment with prior convictions is altogether inapplicable.[157]

Because the plea for mercy or personal statement constitutes nothing more than the defendant's declaration of his interest in remaining alive or avoiding the death penalty, the plea does not warrant impeachment. Thus, use of prior convictions to "impeach" the statement would simply afford the state another argument for imposition of the death penalty.[158] The New Mexico statute expressly disapproves of this use of a "non-statutory aggravating circumstance."[159] The prohibition on the use of such

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> entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death.

Id. at 458. *See also* State v. Rowell, 77 N.M. 124, 419 P.2d 966 (1966). Of course, once the accused testifies, Rule 609(a) permits the introduction of these same priors, if probative of credibility in the judgment of the trial court, to be admitted for impeachment purposes.

155. While testifying regarding matters pertinent to guilt or innocence or, during the capital punishment phase, to whether the murder was committed under the aggravating circumstances charged, the accused would stand in the shoes of any other witness. *See generally* State v. Duran, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), *cert. denied*, 83 N.M. 699, 496 P.2d 1095 (1972).

156. The ten year limitation is not applicable to use of impeachment evidence under Rule 608(b) where the prior bad acts are probative of truthfulness. The rules provide no explanation for disparity of treatment given impeachment evidence offered under Rule 609(a)(2)—as controlled by Rule 609(b)—and that admissible under 608(b). Arguably, the 10-year limitation of 609(b) could be circumvented by a prosecutor's inquiry concerning the "acts," but not the conviction, showing a tendency for untruthfulness if the conviction itself would otherwise be barred by the rule. *Cf.* State v. Wyman, 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981)(acts underlying juvenile adjudications may be admissible under Rule 608(b), even though adjudications are generally not admissible to impeach under Rule 609(c)).

157. N.M. U.J.I. Crim. 40.22 (Repl. Pamp. 1982) limits the jury's consideration of prior convictions and bad acts "for the purpose of determining whether the defendant told the truth when he testified . . . and for that purpose only."

158. The "argument" would be that the cumulative criminality of the accused justifies a sentence of death which otherwise would not be imposed based on the jury's consideration of the defendant and the crime.

159. N.M. Stat. Ann. § 31-20A-5 (Repl. Pamp. 1981); N.M. U.J.I. Crim. 39.34 (Cum. Supp. 1984). In rejecting an attack on N.M. U.J.I. Crim. 39.33 (Repl. Pamp. 1982), the predecessor of 39.34 then in effect, the supreme court in State v. Guzman, 100 N.M. 756, 676 P.2d 1321, *cert. denied*, 104 S. Ct. 3548 (1984) stated:

> Guzman asserts that the language of UJI Crim. 39.33, in effect, allows non-statutory aggravating circumstances to be considered, and that it is therefore unconstitutional. We hold that UJI Crim. 39.33 does not allow the consideration of non-statutory aggravating circumstances. UJI Crim. 39.33 relates to the weighing process, not to the threshold determination of whether an aggravating circumstance exists.
>
> We have previously held that UJI Crim. 39.33 does not allow the death penalty to be imposed in an arbitrary manner which is not rationally reviewa-

circumstances and the legislature's decision not to include a defendant's prior record as a statutory aggravating circumstance[160] are inconsistent with the use of the record to "impeach" testimony[161] offered merely in mitigation and without particular reference to any factual issue raised in the trial of the case.

In order to afford the accused an opportunity to gain whatever advantage direct communication with the jury may have, it is important that the supreme court recognize, and that the trial courts respect, a defendant's right to address the jury without threat of compromise by impeachment with prior convictions. If the defendant merely seeks to ask for continued life by making the statement, or to plead for mercy, little justification, if any, exists for permitting the state to then develop a record of prior criminal conduct which may have little bearing on whether death is an appropriate punishment for the offense that the defendant committed.[162] Use of the prior record, or of evidence of bad acts not resulting in conviction, to "impeach" in this instance may well result in a jury verdict that is based more on punishment for a cumulation of criminality than for the capital crime upon which the state has obtained a conviction. This type of punishment decision clearly violates the legislative intent underlying the New Mexico statute, given the legislative decision not to authorize as an aggravating circumstance a prior or substantial record of criminal activity on the part of the accused.

The right of allocution which the court recognized in *Tomlinson*[163] is the right to make a statement in mitigation of punishment, not merely

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ble. . . .There is no indication that the jury is to consider non-statutory aggravating circumstances. Therefore, we again find no fault with UJI Crim. 39.33.

100 N.M. at 760, 676 P.2d at 1325 (citations omitted).

160. *Id. See* Miller v. State, 373 So. 2d 882 (Fla. 1979). In *Miller*, the Florida Supreme Court reversed a death sentence based on the trial court's consideration of evidence concerning the "future dangerousness" of the defendant. "Future dangerousness" was not an aggravating circumstance under the Florida statute, which expressly limits sentencing determinations to statutorily recognized aggravating circumstances. *Id.* at 885. *See also* Wainwright v. Goode, 104 S. Ct. 378, 381 n.3 (1983). In *Wainwright*, the court held that federal courts must defer to the Florida Supreme Court's determination that a death sentence *was not* based on the trial court's improper consideration of a non-statutory aggravating circumstance. *Id.* at 382 (following Goode v. State, 365 So. 2d 381 (Fla. 1978).

161. N.M. R. Evid. 609. *See* United States v. Hayes, 553 F.2d 824 (2nd Cir.), *cert. denied*, 434 U.S. 867 (1977).

162. "Appropriateness" of punishment is a concept that has, in one sense, assumed a constitutional dimension not previously articulated in reviews of sentencing procedures. Once an accused has been sentenced to life imprisonment by either jury or judge following an adversarial proceeding that resembles, in significant aspects, a "trial," the sentencing decision assumes the dimension of an "acquittal" on the issue of whether the death sentence is appropriate. Arizona v. Rumsey, 104 S. Ct. 2305, 2310 (1984) (following Bullington v. Missouri, 451 U.S. 430, 437-41 (1980)). *Cf.* United States v. Difrancesco, 449 U.S. 117 (1980). *See also* State v. Bullington, 594 S.W.2d 908, 922 (Mo. 1980)(Borgett, C.J., dissenting) (observing that an initial imposition of a life sentence by the jury at defendant's first trial meant that "the jury has already *acquitted* the defendant of whatever was necessary to impose the death sentence" (emphasis added)).

163. 98 N.M. 213, 647 P.2d 415 (1982).

the right to present evidence subject to cross-examination during the punishment hearing.[164] A meaningful application of this right in capital sentencing proceedings requires that the accused be permitted to make the statement or plea directly to the jury without threat that evidence of a highly prejudicial and factually irrelevant nature will follow. Of course, if the statement requires rebuttal because the accused misrepresents his prior record or lifestyle, the state should be allowed to rebut the misrepresentation on cross-examination or by extrinsic proof of prior convictions.[165] Otherwise, the accused should make the statement as a plea in allocution, not subject to further examination, leaving the jury free to examine the the plea on its merits.

Reference to usual trial procedures and safeguards for the rights of the accused may minimize the significance of imposing the death penalty.[166] The traditional right of the defendant to make his statement in allocution should not be denied or limited because the sentencing authority might be a jury, rather than a trial judge.[167] Formal recognition of the right of unimpaired allocution will serve the interests of society in reaching correct sentencing decisions in capital cases. Unimpaired allocution will insure that the capital defendant's address to the jury will not be compromised by a prior record of criminal conduct.

VI. CONCLUSION

The right of allocution, recognized in New Mexico, and the constitutional right to present mitigation evidence in capital sentencing proceedings suggest the appropriateness of the right of a capital defendant to make a personal statement or plea for mercy to his jury. Until formal recognition of the right is secured and some standard procedure for ensuring the right is developed, counsel should be aware of the potential for obtaining a ruling on the state's use of a prior criminal record to impeach a pleading defendant.

164. In Strickland v. Washington, 104 S. Ct. 2052, 2070-71 (1984), the Court rejected an ineffective assistance claim based on trial counsel's failure to put on evidence at the sentencing hearing in a death penalty trial. The defendant did engage in a "plea colloquy" with the trial judge, essentially making a personal plea for mercy to the court. In rejecting the attack on counsel's performance, the Court concluded that the plea colloquy was a strategically acceptable alternative to calling other witnesses, whose favorable testimony for the accused would be subject to impeachment.

165. The defendant's right to give testimony in his own behalf is generally provided by N.M. Const. art. II, § 14. By interjecting an issue of fact into the proceedings, the defendant would likely forfeit any protection afforded by the doctrine of allocution. As Chief Justice Burger noted in Harris v. New York, 401 U.S. 222 (1971), "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Id.* at 225. *See also* State v. Maynard, 311 N.C. 1, 316 S.E. 2d 197 (1984).

166. *See* Radin, *supra* note 10.

167. N.M. Stat. Ann. § 31-20A-1(D) (Repl. Pamp. 1982) provides that in a non-jury sentencing proceeding "the judge shall allow argument and determine the punishment to be imposed." This section would appear to provide sufficient flexibility to permit the accused to make a plea for mercy to the trial judge.

Rules 608[168] and 609[169] of the New Mexico Rules of Evidence both follow the weighing process of Rule 403[170] in directing the trial court to determine whether the prejudice to the accused from introduction of evidence of prior convictions or bad acts outweighs the probative value of the evidence. Counsel should prepare and file prior to trial a motion in limine setting forth the defendant's desire to make a statement to the jury without threat of impeachment with his prior record or conduct and request a ruling on this motion.[171] If denied, counsel should then preserve the error by tendering the testimony of the defendant that: (1) he desires to make a statement or plea for mercy to the jury; (2) he is aware of a prior record of convictions or bad acts which might be admissible to impeach his testimony; (3) the threat of prejudice to his jury from disclosure of the prior record is coercing him into foregoing his right to testify, which the United States and New Mexico constitutions protect; and (4) that the potential for jury prejudice which would result if the prior record is disclosed to impeach his statement compromises his right of allocution.[172]

In the event the trial court grants the motion in limine, counsel must carefully prepare his witness so as to avoid any misrepresentation concerning the character of the defendant and his propensity for lawfulness. Otherwise, the defendant may forfeit any advantage gained with the motion in limine by opening up his prior record of convictions or bad

168. N.M. R. Evid. 608.

169. N.M. R. Evid. 609 (except as to convictions for offenses involving dishonesty or false statement). In contrast, the Arizona Rule requires the court to engage in the probative value/prejudice weighing process even when the prior convictions involve dishonesty or false statement. State v. Dixon, 126 Ariz. 617, 617 P.2d 779 (1980).

170. N.M. R. Evid. 403.

171. The Vermont Supreme Court, in State v. Ritchie, 144 Vt. 121, 473 A.2d 1164 (1984), reversed the trial court's refusal to rule, prior to jury selection, on defendant's motion to exclude evidence of his prior convictions. Counsel urged in his motion that a pretrial ruling was necessary in order for him to determine the approach to be taken in his opening statement, whether or not to voir dire the panel on defendant's priors, and how to counsel defendant on whether to testify in his own behalf. *Id. See* United States v. Provenzano, 620 F.2d 985 (2nd Cir. 1980); State v. Cook, 106 Idaho 209, 677 P.2d 522 (Ct. App. 1984).

But see State v. Allen, 91 N.M. 759, 581 P.2d 22 (Ct. App. 1978). In *Allen*, the New Mexico Court of Appeals rejected defendant's claim that the trial court erred in not making a pre-trial ruling on admissibility of prior convictions for impeachment purposes. *Id.* at 761, 581 P.2d at 24.

172. *See* State v. Foye, 100 N.M. 385, 671 P.2d 46 (Ct. App. 1983). In *Foye*, the court of appeals recognized that a constitutional argument for severance may be predicated on the accused's desire to both testify as to allegations in some counts of a multi-count charging instrument while remaining silent on others. The court suggested a procedural predicate for preserving the issue on appeal which is adopted to the issue discussed in this Article. *Id.* at 388, 671 P.2d at 49. *See also* United States v. Hendershot, 614 F.2d 648 (9th Cir. 1980) (accused preserved issue on improper use of prior convictions as chilling right to testify by outlining on witness stand his proposed testimony which would have been offered before the jury but for the prospect of impeachment with prior record).

acts for true impeachment.[173] As in preparation of the testifying defendant for cross-examination, counsel must focus on those factors which may enhance the persuasive impact of his client's statement upon the jurors, particularly with regard to his expressions of sincerity and of personal belief in his own self-worth and in his plea for leniency.

Finally, the New Mexico Supreme Court should affirmatively recognize the use of the personal statement as a right of the capital defendant. Early recognition of the right by decision or through adoption of an appropriate jury instruction may avoid execution of a citizen who lacked the opportunity to speak to his jury regarding his interest in continued life and his belief that his life may be worth saving in spite of the damaging evidence presented at trial concerning his participation in a capital crime.[174] Certainly, forcing the accused to make an intelligent decision whether to address the jury, based on the prospect of impeachment with his prior record, assumes greater gravity when the potential punishment is death. Due process requires that the defendant be freed from the normal operation of rules involving trial and appellate strategy so that he may plead for mercy or leniency because the consequence of his plea may be the imposition of a life sentence instead of punishment by death.

173. For example, the Ninth Circuit Court of Appeals has observed in considering challenges to the use of priors under Rule 609(a): "Normally the court should err on the side of excluding a challenged prior conviction, with a warning to the defendant that any misrepresentation of his background on the stand will lead to admission of the conviction for impeachment purposes." United States v. Cook, 608 F.2d 1175, 1187 (9th Cir. 1979) (en banc), *cert. denied*, 444 U.S. 1034 (1980). *Cf.* United States v. Erb, 596 F.2d 412 (10th Cir. 1979), *cert. denied*, 444 U.S. 848 (1979) (defendant's testimony opened door to evidence of similar acts previously ruled inadmissible by trial court in government's case in chief).

174. N.M. U.J.I. Crim. 39.12 (Cum. Supp. 1984) instructs the jury to "consider all evidence from the trial in which the defendant was found guilty of murder" in assessing punishment. *See also* N.M. U.J.I. Crim. 39.33 (Repl. Pamp. 1982)(former formulation of this instruction).

COMMENT